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No. 96-1581

In The

Supreme Court of the United States

October Term, 1997

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF THE STATE OF SOUTH DAKOTA

MARK W. BARNETT
Attorney General
State of South Dakota
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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INTRODUCTION

This brief replies to the arguments of the Tribe and the United States on the issue of whether the Yankton Reservation has been disestablished.[1] As we demonstrate below, these arguments are fatally flawed in that they seek to systematically avoid the force of the "almost insurmountable presumption" of disestablishment created by the use of "cession and sum certain language" in the Yankton Agreement; they likewise virtually ignore the century long, exclusive exercise of jurisdiction in the now disputed area by the State of South Dakota. Other arguments unsuccessfully attempt to create ambiguity where none actually exists. In sum, the presumption arising from "cession and sum certain language" applies here. It has not been shown to have been overcome, and the reservation should be found to be disestablished.

ARGUMENT

I. THE "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT CREATED BY "CESSION AND SUM CERTAIN" LANGUAGE IN THE 1894 YANKTON AGREEMENT HAS NOT BEEN OVERCOME.

This Court has found that an "almost insurmountable presumption" of diminishment, *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984), or a "nearly conclusive presumption" of diminishment, *Hagen v. Utah*, 510 U.S. 399, 411 (1994), arises from "cession and sum certain" language used in a surplus land act. *See also DeCoteau v. District County Court*, 420 U.S. 425, 445-46 (1975).

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[1] As used herein, "App." refers to the Appendix to the Petition for Writ of Certiorari; "JA" refers to the Joint Appendix; "TB" refers to the Brief on the Merits of the Tribe and Darrell Drapeau; "USB" refers to the Brief on the Merits of Amicus Curiae United States; "SDB" refers to the Brief on the Merits of the State of South Dakota; "DCO" refers to the District Court's Opinion below.

Neither the Tribe nor the United States denies that Articles I and II of the Yankton Surplus Land Act (Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894)), App. 112-13, provide for a "cession" of lands for a "sum certain." Accordingly, the "almost insurmountable presumption" of diminishment obtains here. Unless other features of the 1894 Agreement and its history fully and decisively contradict a finding of diminishment or disestablishment – and they do not – the Tribe cannot prevail.[2] *See Yankton Sioux Tribe v. South Dakota*, App. 47 n.29 (Magill, J., dissenting) (discussing weight of evidence needed to overcome the presumption).

Neither the Tribe nor the United States directly argues that the "almost insurmountable presumption" has been overcome in this case and thus they essentially concede it cannot be overcome.[3] Instead, in the face of this stark legal and factual background, the Tribe and the United States take three tacks to avoid the presumption, none of which have merit.

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[2] Following the lead of this Court, we have used the terms "diminishment" and "disestablishment" interchangeably to denote the elimination of the boundaries of the reservation within the affected area. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 598 n.20 (1977) referring to *DeCoteau* as recognizing "disestablishment" and *Solem*, 465 U.S. at 469 n.10, stating *DeCoteau* found Lake Traverse Reservation "diminished." Thus, within the affected area, "Indian country" status attaches to remaining or nonextinguished "allotments," *see* 18 U.S.C. § 1151(c); *DeCoteau*, 420 U.S. at 427-28 & n.2, and "dependent Indian communities." 18 U.S.C. § 1151(b). The State has respected, *see generally* T 645-646, JA 685-86; T 732, and will continue to respect the special status, jurisdictional and otherwise, of such lands in accordance with developing federal law. *See Solem*, 465 U.S. at 467; *United States v. Stands*, 105 F.3d 1565, 1571-1572 (8th Cir. 1997).

[3] The United States in two sentences at USB 12 indicates that it might be prepared to argue the point, but its discussion slides into assertions relating to modes of construction. *See* USB 13-14.

A. The "Almost Insurmountable Presumption" Arose Notwithstanding Allegations Regarding Other Factors.

The Tribe and the United States first argue that if other factors cut against diminishment or disestablishment, the presumption does not apply. TB 48-49; USB 10-11. This turns the presumption recognized by this Court on its head. Where there is "cession and sum certain" language, the powerful presumption of disestablishment exists and neither the Tribe nor the United States cites any authority to the contrary.[4] Other factors can help the tribal case only if they can somehow overcome the presumption. Thus, the *Solem* court did not qualify its recognition of when the presumption arises by stating that it would be contingent on factors such as other language in the agreement, *Solem*, 465 U.S. at 474; the negotiating history, *id.* at 476-77; the congressional history, *id.* at 477-78; or the subsequent treatment of the area, *id.* at 478-480. Likewise, the recognition of the presumption in *Hagen*, 510 U.S. at 411, is unqualified.

The repeated argument that the Tribe should prevail because other factors are ambiguous is simply wrong. Even if the meaning of the factors were ambiguous (and we demonstrate below that they *buttress* the presumption), any such ambiguity would fall far short of the clear-cut proof necessary to overcome the presumption, and the State would prevail.

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[4] Neither the United States nor the Tribe has even attempted to refute the State's explanation of "great weight" of the presumption as flowing both from Indian law and international law understandings. *See* SDB 16 n.8.

B. The "Almost Insurmountable Presumption" Arose Notwithstanding the Fact That Lands Retained by the Tribe Were Scattered Throughout the Area About to Be Disestablished.

The United States also argues that the "cession" and "sum certain" language should be accorded little respect here because the "ceded lands were scattered over the reservation." USB 11. This argument finds no support in this Court's decisions or in history. In the first place, the presumption exists because of the powerful and plain import of "cession" and "sum certain" language in the operative sections of the 1894 Agreement. That language is no less powerful and plain when the allotments are scattered throughout the reservation prior to their sale. And it is too late in the day for such an argument. Disestablishment of the Lake Traverse Reservation was found even though "trust allotments are scattered in a random pattern throughout the 1867 reservation area." *DeCoteau*, 420 U.S. at 428; *see also id.* at 466 (Douglas, J., dissenting).

C. The "Almost Insurmountable Presumption" Arose Notwithstanding That the Original Proposal by the Government Was for "Appraisal and Sale to the Highest Bidder."

The Tribe appears to argue that the 1894 Agreement cannot be read as a "cession and sum certain" arrangement despite its plain language because an *original* suggestion of the government was for an "appraisal and sale to the highest bidder" and not for a "cession and sum certain" agreement. *See* TB 7-8, 32-33; *see also* USB 3 n.2. What matters, however, is not a never-adopted proposal, but the final cession and sum certain arrangement. *See generally Russello v. United States*, 464 U.S. 16, 23-24 (1983). The history of the disestablishment of the Sisseton Reservation confirms this analysis. In the Sisseton case, the instructions to the negotiators indicated that it might be " 'inadvisable' " for the Tribe to sell all of its surplus lands. *DeCoteau*, 420 U.S. at 434. Nonetheless, all the surplus lands *were* sold, and the Court's

analysis proceeded on the basis of what actually occurred to find that the reservation had been disestablished.[5]

Second, both the United States (USB 3 n.2) and the Tribe (TB 32-33) appear to argue that the Tribe ultimately was willing to adopt the direct sale method instead of the appraisal and sale method because only by the direct sale method could the Tribe sell all of its land. But both ignore the further implication of their argument: The desire of the Tribe to sell all of its surplus land should have raised the presumption, even for the majority below, that the Tribe desired the reservation to be disestablished. As the majority stated (in analyzing the original intent question) at App. 29: "Had the intent been the elimination of the reservation, it would have been necessary that all surplus lands be purchased."

Third, this argument has already been litigated. The Tribe, in *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 176 (Ct. Cl. 1980), urged that the 1894 Agreement should be "revised for the purposes of this case" to constitute an "appraisal and sale" arrangement but the court of claims found that the facts did not support the revision:

> it appears from the record that the Indians were willing to sell the subject lands directly to the United States for a proper price. At most, it could be said there was a split among members of the tribe as to how they wanted to dispose of the land.

Id.[6]

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[5] The Tribe implies at TB 6 and 36 that "95,000 acres" remained in its possession after 1894. In fact, as the Interior document set out at JA 98-99 establishes, the "95,000 acres" in question consisted of "allotments made" but simply not yet "examined and approved." *See also* Exh. 605, JA 117.

[6] The court stated that there "may have been some overreaching" but it could not conclude that "such behavior amounted to fraud or duress." *Yankton Sioux Tribe v. United States*, 623 F.2d at 176.

D. The 1894 Act May Not Be Reasonably Read to Alter Only a Few Words of the 1858 Treaty.

The United States argues that, in light of Article XVIII, the Act may "reasonably be read as simply opening the surplus lands" while preserving reservation boundaries and the Tribe's "right of self-government within them." USB 14. According to the United States "the [1894] Agreement thus modifies only that portion of Article 10 of the 1858 Treaty [Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859)] that excluded white settlers from the Reservation" (*Id.*) or, in other words, only the first part of the first sentence of Article 10 (about 45 words).[7]

The United States, in presenting this argument, fails to prove (or even assert) that the "almost insurmountable presumption" created by "cession and sum certain" language has been overcome. The United States also ignores the fact that the primary focus of disestablishment litigation is the "operative language" of an agreement. *See, e.g., Hagen,* 510 U.S. at 412-14; *Solem,* 465 U.S. at 472, 473 n.15, 474; *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 593 n.15 (1977). Indeed, *Hagen* might have been decided differently had the placement of critical agreement language been different. *See generally Hagen,* 510 U.S. at 413; *see also Solem,* 465 U.S. at 474-75. The United States, contrary to the case law, seeks to subordinate the "operative language" of the 1894 Agreement in favor of other language, and its argument should be rejected.

Next, the United States fails to point to *any* precedent, in *any* context, in which a savings clause has negated the heart of an agreement or a statute. *See generally Dollar Savings Bank v. United States,* 86 U.S. 227, 236 (1873): ("broad construction" of a "proviso" in an act of the legislature will not be allowed when it is "plainly repugnant to the body of the Act").

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[7] The United States thus reads at least one provision "out of a statute," contrary to its own statutory construction argument. *See* USB 13.

In addition, we note that the United States (USB 12-13) and the Tribe (TB 26) both put some emphasis on the fact that Article XVIII contains two separate sentences which are claimed to preserve reservation boundaries. Neither sentence references reservation boundaries, however, and the second sentence does, in fact, refer directly to the preservation of "annuities," App. 120, a critical matter for the Tribe. *See* T 54-55, JA 588-89. *See also* SDB 21-23 (other monetary claims of concern to the Tribe). Neither the Tribe nor the United States can point to anything in the record which substantiates the position that the Tribe as a whole, or even one of its members, or the United States, intended that one or both sentences of Article XVIII preserves reservation boundaries. Indeed, as we have pointed out in our opening Merits Brief, reading the agreement to accomplish the cession of lands for sum certain without altering reservation status would be directly contrary to the common understanding of the day. *Solem,* 465 U.S. at 468, relates:

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century.

The United States thus urges an understanding on the part of the United States and the Tribe which was "unfamiliar" to both and asserts that this imagined joint understanding was incorporated, *sub silentio,* into Article XVIII of the Agreement. The argument is without merit.

While the Tribe and both amici go to great lengths to discuss canons of construction, they unaccountably have failed to address the argument that because Article XVIII is *itself* internally ambiguous, it cannot overcome the extraordinarily clear provisions of Articles I and II, which create the "almost insurmountable presumption" of disestablishment. As stated in *DeCoteau,* 420 U.S. at 447, "A canon of construction is not a license to disregard clear expressions of tribal and congressional intent." Because a "clear expression of tribal and congressional intent" to disestablish is created by the use of "cession and sum certain" language, a canon of construction

does not allow Article XVIII to overcome that expression. *See also Rosebud,* 430 U.S. at 597-598.[8]

II. CONTRARY TO THE ARGUMENTS MADE BY THE TRIBE AND THE UNITED STATES, OTHER PROVISIONS OF THE 1894 AGREEMENT SUPPORT DISESTABLISHMENT.

A. The Liquor Provision Strongly Indicates Disestablishment.

The United States admits that *Rosebud,* 430 U.S. at 613-14, found that a liquor prohibition in a surplus land act "indicated diminishment of the reservation." USB 17. Additional Yankton legislative history not present in *Rosebud* strengthens the argument for disestablishment here. In particular, the statement of the Acting Commissioner of Indian Affairs to Congress identifies the legal justification for the article as "the decision of the Supreme Court in *United States v. Forty-three Gallons of Whiskey,* (93 U.S., 188). . . . " S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894) (hereinafter "Negotiations") at 6-7, JA 121. *United States v. Forty-three Gallons of Whiskey,* 93 U.S. 188, 195 (1876) determined that Congress could prohibit the introduction of liquor *outside of a reservation*. Citation of this case (one of only two case citations discovered in the "Negotiation" document) provides weighty evidence of the perception that reservation status would be lost through the agreement.[9]

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[8] We also note that neither the Tribe nor the United States has responded to the point that if the canon of construction does apply, it should operate in *favor* of disestablishment because, in 1894, Congress would have perceived that disestablishment would "benefit" the Indians. *See generally* Prucha, II *The Great Father* 631 (1984); Cohen, *Handbook of Federal Indian Law* 78 (1942).

[9] In light, inter alia, of the legislative history made in this case, the "Indian country" argument of the United States based, inter alia, on events in 1913 and 1948, *see* USB 18 & n.12, should be rejected for the 1894 Congress clearly appreciated that it was eliminating the reservation status of Yankton as demonstrated above.

The United States also argues that the Yankton liquor provision lacks force because it treats, in different language, the ceded lands and the lands retained in Indian ownership. The different treatment was merited, of course, because the lands were intended to have a truly different status resulting from the 1894 Act.

Both the United States (USB 20) and the Tribe (TB 34) also rely on a statement within the Commissioner's Report referring to intoxicants within the "limits of the reservation," *see* JA 154-55, as evidence of continuing reservation status. The 1894 Agreement itself did not, however, simply refer to a "reservation" in the liquor article but added the term "*as described* in the treaty . . . dated April 19th, 1858. . . . " App. 120 (emphasis added). Furthermore, the enforcement provision of the 1894 Act which adopted the agreement referred to "lands included in the Yankton Sioux Indian Reservation *as created* by the treaty of April nineteenth, eighteen hundred and fifty-eight. . . . " 28 Stat. 286 (1894). App. 124 (emphasis added). Thus, each document refers back to the *1858* boundaries, a reference which would be superfluous if the 1858 reservation were understood to remain in existence.

B. The Provision of the Act Reserving Sections 16 and 36 for Schools Demonstrates Disestablishment.

The 1894 Act reserves sections 16 and 36 of each congressional township "for common-school purposes." App. 123. *Rosebud,* 430 U.S. at 599-602, noted substantially similar language in the act at issue and also quoted language of the South Dakota Enabling Act which indicated that school land grants could not be effective until the reservation status of the affected counties had been " 'extinguished and such lands . . . restored to . . . the public domain.' " *See also DeCoteau,* 420 U.S. at 442 (similar provision at Sisseton.)

The United States now urges this Court to distinguish *Rosebud* because the Yankton Act "simply 'reserve[s]' the sixteenth and thirty-sixth sections from settlement without taking the further step of granting them to the State, as

contemplated by the enabling act when a reservation is extinguished." USB 17. This is a distinction without a difference, however, for 8,000 acres of school land were, in fact, conveyed by the United States to South Dakota in 1895. *See Yankton Sioux Tribe v. United States*, No. 332-D at 67 (Ct. Cl. Trial Div. Oct. 18, 1979). (Unreported decision lodged with Clerk.) *See also* Merits Amicus Brief of Dante, et al. 4a-6a.

III. THE NEGOTIATIONS BETWEEN THE TRIBE AND THE UNITED STATES AND THE EXECUTIVE PROCLAMATION DEMONSTRATE DISESTABLISHMENT.

A. The Negotiations Between the Tribe and the United States Indicate a Recognition of Disestablishment.

The record of negotiations between the Yankton Tribe and United States shows that both believed that the 1894 Agreement being negotiated was equivalent to the 1858 Treaty of the Yanktons (which disestablished a large part of their reservation) and the agreement just negotiated by the United States with the Sisseton Indians (which disestablished the Lake Traverse Reservation). *See* Negotiations at 54, 56, 58, 59, 68, 71; JA 225, 226, 231, 236, 239, 270, 278-79. The inescapable conclusion is that the United States and the Yankton Tribe correctly perceived that the 1894 Yankton Agreement would also disestablish the reservation. *See also* Merits Amicus Brief of Lewis County at 8.

The Tribe and the United States essentially ignore this strong indicator of intent and center on the lack of comments in the negotiation record to the effect that the cession of land would "leave your reservation a compact, and almost square tract. . . . " USB 21; TB 38. Such comments are not found in the Yankton negotiating record because the entire reservation was disestablished, as was the Sisseton Reservation. *See DeCoteau*.[10]

[10] The United States argues that disestablishment was shown in *DeCoteau* by a comment from a tribal spokesman who stated that the reservation "was given us as a permanent home, but now *we have decided to sell*." USB 21 (emphasis added). Despite the argument of the United States to the contrary (USB 21-22), a similar analysis should be made of statements in the *Yankton* record regarding the "sale" of lands. *See* Negotiations at 81, JA 309.

Both the United States and the Tribe focus on a comment of Reverend Williamson, whom, we are told, "found" that the agreement would not " 'in any way interfere with the treaty of 1858.' " USB 23; *see also* TB 11. Both should concede that Williamson's statement was incorrect and that, by the 1894 Agreement, the Tribe gave up the "quiet and peaceable possession" of a sizeable part of the tract of "four hundred thousand acres," guaranteed by the 1858 Treaty. App. 102. And both should concede that the Tribe lost the 1858 Treaty right to exclude "white persons" from the reservation by the 1894 Agreement. App. 108. Finally, Reverend Williamson presumably shared in the common turn-of-the-century understanding that reservation status was lost when tribal ownership was lost, *see Solem*, 465 U.S. at 468, and his statement should be read to include that perception.

B. The Presidential Proclamation Indicates Disestablishment.

Rosebud, 430 U.S. at 602-603 establishes that a Presidential Proclamation utilizing cession language constituted an "unambiguous contemporaneous statement" of disestablishment. The Yankton Proclamation likewise contains cession language, Exh. 602, JA 453. The United States, without citing *Rosebud*, apparently attempts to distinguish it by asserting that the Yankton Presidential Proclamation refers to a "Schedule of lands within the Yankton Reservation. . . . " *See* USB 23. *See also* Brief of Amici Curiae Standing Rock Sioux Tribe, et al. at 18. However, the *Rosebud* Proclamation also, at least twice, referred to "Indians of the Rosebud Reservation." *See Rosebud*, 430 U.S. at 602. Furthermore, the Executive Proclamation in the case of the Lake Traverse Reservation, where disestablishment was found, referred to a "Schedule of lands within the Lake Traverse Reservation. . . . " *See* 27 Stat. 1017, 1018 (Apr.

11, 1892). *See generally DeCoteau,* 420 U.S. at 442.[11] The attempt to distinguish the Proclamations is without merit. *See also Hagen,* 510 U.S. at 419-20 (importance of Presidential Proclamation).

IV. THE JURISDICTIONAL HISTORY OF THE AREA FOLLOWING THE 1894 ACT STRONGLY SUPPORTS DISESTABLISHMENT.

A. The Parties Do Not Dispute the State's Exclusive Exercise of Jurisdiction in the Area.

This Court's holdings establish that a long history of undisputed state jurisdiction strongly supports de jure and de facto disestablishment.[12] Such a history is present here. *See Solem,* 465 U.S. at 471-72; *see also Hagen,* 510 U.S. at 420-21; *Rosebud,* 430 U.S. at 603-604. This Court has also stressed the importance of the assumption, by the State, of "unquestioned actual assumption of . . . jurisdiction over the unallotted lands" in question. *Rosebud,* 430 U.S. at 603. However, as neither the United States nor the Tribe disputes, (1) the " 'United States has not attempted to exercise criminal jurisdiction in the area,' " SDB 37 (quoting *State v. Greger,* 559 N.W.2d 854, 866 (S.D. 1997) (App. 154). (2) the "Tribe has not exercised civil or criminal jurisdiction on nontrust lands of the area for the last century," SDB 39, and, (3)

> All criminal offenses on nontrust land (91% of the region) are handled in state courts. Since 1895, the year the reservation was opened, South Dakota

[11] The failure of the Tribe and the United States to seriously dispute the thesis that the Yankton and Sisseton Agreements are "functional twins" with at least seventeen points of identity amounts to a virtual concession of the accuracy of this assessment. *See* Merits Amicus Brief of Dante, et al. at 15-19.

[12] The Federal allegations with regard to the State's "concession" on the force of subsequent events are without merit. *See* USB 7, 20; Pet. Cert. at 23.

> courts have consistently maintained, without intervention by federal or tribal authorities, civil and criminal jurisdiction within the former reservation boundaries.

SDB 35 (quoting *State v. Greger,* App. 154-55).

The United States expresses its primary interest as maintaining law enforcement within the area. USB 1. This implicitly affirms the argument of the State that if the "federal government" had such jurisdiction for the past century it "could quite naturally be expected to have exercised it." SDB 34. Similarly, the Tribe should be expected to have exercised its jurisdiction, and the State's consistent exercise of jurisdiction should have been actively challenged by the federal government or the Tribe. (In fact, the Tribe identifies only one internal BIA letter relating to indemnity school lands which it sees as resistance, but the letter is marginally relevant at best. See TB 44.) The state's century long exclusive exercise of jurisdiction has thus created "justifiable expectations" for those resident in the area that such a system will continue. *See, Rosebud,* 430 U.S. at 604-605.[13]

B. Contrary to the Argument of the United States, the *Perrin* Case Demonstrates Disestablishment.

The United States brushes aside the consistent jurisdictional history (USB 28) and relies on two of its own actions to argue that the evidence is too " 'rife with contradictions and inconsistency' " to demonstrate a congressional intent to diminish. First, the United States asserts that its continuing inconsistent treatment was demonstrated by its litigation position in *Perrin v. United States,* 232 U.S. 478 (1914). The United States argues that it took the position there that the "reservation had not been diminished" and implies that the

[13] Evidence as to the exclusive nature of state jurisdiction is even *stronger* in this case than in the most recent case in which it was relied upon as a factor in finding disestablishment. *See Hagen,* 510 U.S. at 441 (Blackmun, J., dissenting); *see also, Rosebud,* 430 U.S. at 616 n.1-2 (Marshall, J., dissenting).

significance of the *Perrin* case lies in this position. USB 24. We agree that *Perrin* is significant but disagree that its importance flows from the federal position. Rather, it flows from the conflict of the federal position and that of the defendant and, more importantly, the resolution of the question by this Court.

To begin, we note that the United States is wrong when it asserts that the defendant took the same position that it took. USB 24-25. In fact, Mr. Perrin admitted that he had sold alcohol at his drugstore in Dante, as the indictments had charged, but explicitly asserted in his Assignments of Errors that the drugstore sales were "not upon the said Indian reservation." Transcript of Record at 28, 29, *Perrin v. United States*, No. 707 (1913). Similarly, in the *Perrin* Brief for Plaintiff in Error at 2, Mr. Perrin asserted that the crime "attempted to be alleged" did not pertain to an act "upon any existing Indian reservation." Indeed, the United States explicitly recognized that the reservation status of the involved land was at issue because of Mr. Perrin's arguments, and it stated in its Brief for the United States in *Perrin* at 2 that Mr. Perrin had earlier

> challenged the jurisdiction of the court on these grounds: (1) The sale was on his property and not on a reservation.

But the critical nature of *Perrin v. United States* is not, as the United States implies, the position that the United States took in that litigation. *See* USB 24. Instead, it is the action of this Court. At a minimum, as the United States conceded in the court below, *Perrin* "assumed diminishment." Brief for the United States as *Amicus Curiae* In Support of Plaintiffs-Appellants at 19 n.10, *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 99 F.3d 1439 (8th Cir. 1996) (No. 96-2647). Furthermore, we would submit that *Perrin* found disestablishment by referring to the "ceded lands formerly included in the Yankton Sioux Indian Reservation." *Perrin*, 232 U.S. at 480. The *Perrin* court also referred to the "original reservation" as embracing 400,000 acres and contrasted that situation with the existing "allotments" of 100,000 acres. *Id.* at 486. Moreover, the *Perrin* opinion was unnecessary if there was no finding of disestablishment for liquor

was already illegal within reservations. *See Perrin*, 232 U.S. at 484 (quoting *United States v. Forty-three Gallons of Whiskey*, 93 U.S. at 197).[14]

C. The 1941 Opinion of the Acting Solicitor Has Been Shown to Be Based Upon Faulty Premises of Law and to Be Contradicted by the Author and Subsequent BIA Announcements.

The second main fact which the United States asserts demonstrates a record "rife with contradictions" (USB 24) is a 1941 letter of the Acting Solicitor. We have pointed out that the letter is based upon faulty premises of law. *See* SDB 43; USB 25. We note further that the United States is unable to cite *any* instance that the erroneous letter was relied upon. This anomalous, legally wrong, letter does not create a record "rife with contradictions."[15]

Finally, the United States informs us that: "The official position of the Department of the Interior *remains* that the Reservation was not diminished." USB 25 n.17 (emphasis added). In fact, the Commissioner of Indian Affairs in 1894 recognized that the Yankton lands would be "restored to the public domain," *see* Exh. 11, JA 450. Department of the Interior officials have referred to the "former" Yankton reservation, *see, e.g.*, Exh. 664, JA 474 (1910); Exh. 665, JA 480

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[14] *Perrin* relied upon *Dick v. United States*, 208 U.S. 340 (1908) as a case "in point." *Perrin*, 232 U.S. at 485. *Dick*, 208 U.S. at 352 found that ceded Nez Perce lands were not "Indian country" and that the State therefore had complete jurisdiction over Indians in the ceded area, except for liquor purposes, based upon a provision similar to that at issue in *Perrin*. See also *Rosebud*, 430 U.S. at 613 n.47 (discussing *Dick* and *Perrin*.) *See generally* Merits Brief of Lewis County.

[15] The United States apparently denies that the Acting Solicitor contradicted his own opinion a year later. USB 25 n.17. Acceptance of this federal theory, however, demands that we assume that the Acting Solicitor meant to characterize reservation areas as " 'buffer' areas" in 1942. *See* Cohen, *Handbook of Federal Indian Law* 353 (1942). *See generally* SDB 43; Merits Brief of Southern Missouri Waste Management District 42-50.

(1921) and, along with other federal agencies, treated the reservation as disestablished. *See*, SDB 37-42. In 1932 and 1962, Interior approved tribal constitutions which did *not* claim reservation status. Exh. 651, JA 483-88; Exh. 652, JA 493-513. In 1969 an Associate Solicitor's opinion found that the 1894 Act "diminish[ed] the area over which the [Yankton] tribe might exercise its authority." Exh. 628, JA 525. Finally, *as recently as 1994*, the EPA, after consultation with Interior, stated that the "Yankton Sioux Reservation was disestablished by the Act of 1894." *See* 59 Fed. Reg. 16649 (Apr. 7, 1994), Exh. 662, JA 532-33. The record in this case suggests, as did the record in *South Dakota v. Bourland*, 508 U.S. 679, 696-97 (1993), that the United States has not fairly represented the position of an agency of the federal government.

D. The Tribe's Other Arguments as to Reservation Status Are Without Merit.

The Tribe, in its "Summary of the Argument," asserts that it "has always maintained a continuum of tribal governance over the Reservation area." TB 18. It is notabie that nowhere in its fifty-page brief does the Tribe attempt to substantiate this claim and, indeed, it cannot be substantiated. *See generally* App. 39; DCO App. 87-88; SDB 46-47.

The Tribe also contends that weight should be given to the assertion that its casino is a substantial moneymaker and has become a significant employer in the area. *See, e.g.*, TB 18, 46. The creation and expansion of the casino occurred, however, in the *absence* of recognized reservation status, and there is no allegation that the viability of the casino is tied to reservation status.

The tribe also makes an argument as to the use of the term "reservation" in various records. The Tribe fails to note that its own expert admitted that it cannot be known whether a federal officer was using the term to denote a legal reservation or simply a place where Indians live, without appropriate

"context." T 96-97, 103-104, JA 621-23.[16] Similarly, a BIA Realty Officer testified that twenty years after this Court decided *DeCoteau*, which found that the Lake Traverse Reservation had been disestablished, the BIA is still using certain maps showing Lake Traverse Reservation boundaries; the Realty Officer also admitted that one cannot tell from simply looking at a BIA map whether its purpose is to show actual reservation boundaries. T 367.

The Tribe argues, in addition, that the retention of lands by the United States for the Indian agency and for schools indicates reservation status would be retained, implying that no such lands were retained at Sisseton. TB 30. *See also* USB 15-16. The Tribe is simply wrong in distinguishing the two cases. In both, lands were ceded by the Tribe to the United States for the agency and for schools. *See DeCoteau*, 420 U.S. at 435 n.16 quoting S. Exec. Doc. No. 66, 51st Cong., 1st sess. 1 (1890): (" 'the Government should own the lands on which the agency and school buildings are located.' "); 420 U.S. at 438 n.19: (" 'Indian title' " to lands occupied by the " 'agency and missionary societies' " will be " 'extinguished.' "); *Id.* at 442-43: (" 'Federal Indian agents have remained active in the area' "). Similar lands were made available to the United States at Rosebud. *See* 33 Stat. 254, 257 (1904). *See also Rosebud*, 430 U.S. at 621-622 (Marshall, J. dissenting). In addition, the dissent of Justice Blackmun in *Hagen*, 510 U.S. at 432, quotes a statement in the Utah negotiations to the effect that " 'your Agency will be continued just the same as now.' " In all three cases disestablishment was found. Contrast *Solem*, 465 U.S. at 475 n.18. In any

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[16] The Tribe's expert, although testifying that the number of references to a "former" Yankton reservation was "relatively small" admitted that "I couldn't say" what percentage of times the term appeared in the documents. T 265. The expert's knowledge of the documents was not as complete as the Tribe would imply; the expert was forced to admit that Exh. 665, JA 480, which used the term "former Yankton-Sioux Indian Reservation," was "new to me today." T 268.

event, the retention of small amounts of land by the government is no more than would be expected and says little about the retention of the boundaries of the reservation.

Finally, we note the Tribe's insistence that recognition of reservation boundaries is demanded by the "drastic sea-change in federal policy in the 1930s." TB 42. The Tribe does not tell us how the 1894 Agreement can be altered by this "sea-change." Moreover, neither the Tribe nor the United States has acted as if the 1930s' "sea-change" affected this Tribe. Thus, the tribal constitution in 1932 does not claim reservation status or assert jurisdiction over any land base, Exh. 651, JA 483-88, and members of the tribal council could be from any part of Charles Mix County, although the 1858 reservation boundary includes only one-half of the county. Even the constitution adopted in 1962, and effective today, fails to claim reservation boundaries and status. Article VI, Section 1 states:

> The territory under which this Constitution shall exist shall extend to all original Tribal lands *now owned by the Tribe* under the Treaty of 1858.

Exh. 652, JA 499 (emphasis added). Both constitutions were approved by the BIA.

We agree, of course, that the reversal of federal policy produced constitutions for numerous tribes which *did* claim jurisdiction over all territory within the original confines of certain reservations. These claims were frequently *rejected* by this Court. *See, e.g., Hagen*, 510 U.S. at 441 (Blackmun, J., dissenting); *Rosebud*, 430 U.S. at 616 n.1 (Marshall, J., dissenting); *DeCoteau*, 420 U.S. at 443). That the post "sea-change" constitutions adopted by *this* Tribe and approved by the BIA do not claim reservation boundaries makes the Tribe's claim to boundaries here all the more tenuous.

E. Land and Population Developments Strongly Support Disestablishment.

The two critical demographic developments – landownership and population – each confirm disestablishment. *See Hagen*, 510 U.S. at 421-22; *Solem*, 465 U.S. at 471-72;

Rosebud, 430 U.S. at 604-05; *see also DeCoteau*, 420 U.S. at 428. The United States and the Tribe ignore the landownership factor and attempt to cloud the population statistics.

First, it is of critical importance that only nine percent of the land within the purported reservation is today in trust status. *See* T 645, JA 685; App. 42 n.25. *See also* BIA Map at App. 159.[17] Both the United States and the Tribe simply ignore this fact, but it is critical because, prior to the decisions below, trust status defined the maximum reach of tribal and federal authority over non-Indians who could not participate in tribal government. Thus, before 1995, the State exercised unrestricted civil and criminal jurisdiction, and had for a century, over all persons on the non-Indian lands which now constitute more than 90 percent of the purported reservation; all persons, Indian and non-Indian, shared in the governance of the area.

Under the regime sought to be imposed, non-Indians engaging in activities anywhere within the newly recognized "reservation" will be subject to the maze of civil and criminal jurisdiction characteristic of reservations generally but will not be able to participate in tribal governance of the area.

Second, 68 percent of the persons resident in the purported reservation are non-Indians, according to the United States Bureau of the Census. Exh. 614, JA 527-529. Thus, the decision sought to be affirmed would substitute a new minority government of less than one-third based on tribal membership (and thus, to a degree, race) for the present government of all persons.[18]

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[17] *United States v. Stands*, 105 F.3d 1565-71, 1572 (8th Cir. 1997) indicates that not all trust land is "Indian country". Thus, the nine percent figure is the maximum amount of "Indian country" in the area.

[18] Both the United States and the Tribe attempt to rely on assertions of Professor Hoover as to tribal members resident on the reservation. *See* USB 30 (citing both the 32 percent census figure and "the Tribe's own figures" showing 44 percent tribal residents); TB 16 (citing Hoover at JA 545 for the proposition that 3,400 Indians lived on the reservation in 1993). Professor Hoover's numbers are surely unreliable. The record reflects that

In sum, the record demonstrates that less than ten percent of the land is trust land and less than one-third of the persons within the now disputed area are Indians. This area thus falls directly into the category of those "predominantly [68%] populated by non-Indians with only a few [9%] surviving pockets of Indian allotments. . . . " *Hagen*, 510 U.S. at 420.

CONCLUSION

For the foregoing reasons, the State of South Dakota respectfully requests that the judgment of the Court of Appeals be reversed and that this Court find that the area has lost "reservation status" under 18 U.S.C. § 1151(a), and that the only "Indian country" remaining in the area is found in the unextinguished allotments, 18 U.S.C. § 1151(c), and "dependent Indian communities" pursuant to 18 U.S.C. § 1151(b).[19]

Respectfully submitted,

MARK W. BARNETT
Attorney General
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215

Hoover obtained his statistics simply by calling the tribal office. T 240-243. See JA 641-643. The Tribal Chairman, in turn, admitted that the tribal resident population statistics were not based upon any actual count, but merely took the total membership of the Tribe and divided it in half. T 313-15, JA 652-53.

[19] Neither the Tribe nor the United States now disputes that, if this case is reversed, "Indian country" status is limited to the lands listed above. The State, of course, will continue its special treatment of these lands in accordance with federal law. *See also,* n.2, *supra. See generally* Merits Amicus Brief of Charles Mix County at 30 n.11; Brief of Duchesne County, et al., On Writ of Certiorari; Petition for Writ of Certiorari *Duchesne County v. Ute Indian Tribe,* No. 97-570 (Sept. 29, 1997).